No. 93-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN,

Petitioner,

—v.—

COORS BREWING COMPANY,

Respondent.

BRIEF *AMICI CURIAE* ON BEHALF OF RESPONDENT SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; and THE AMERICAN ADVERTISING FEDERATION

John F. Kamp
American Association of Advertising Agencies
1899 L. Street, N.W.
Washington, D.C. 20036

Attorney for A.A.A.A.

Jeffrey Perlman
1101 Vermont Ave., N.W.
Suite 500
Washington, D.C. 20005

Attorney for AAF

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for Amici Curiae
(Counsel of Record)

Gilbert H. Weil
60 East 42nd Street
New York, New York 10165

Attorney for A.N.A.

Henry L. Bauman
Valerie Schulte
National Association of Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036

Attorneys for N.A.B.

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Interest of *Amici Curiae*

The Association of National Advertisers, Inc., (A.N.A.), the National Association of Broadcasters (N.A.B.), the American Association of Advertising Agencies (A.A.A.A.), and the American Advertising Federation (AAF) respectfully submit this brief *amici curiae* in support of respondent. Written consents to its filing have been granted by the parties and filed with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The National Association of Broadcasters (N.A.B.), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. N.A.B. seeks to preserve and enhance its members' ability to disseminate freely information concerning commercial activities, the activities of government and other matters of public concern. N.A.B. and its members oppose the use of government censorship of truthful information about lawful activity as a tool to manipulate the behavior patterns of the American public.

The American Association of Advertising Agencies (A.A.A.A.) is the national trade association of the advertising agency industry, representing more than 750 advertising agencies throughout the United States. Members of A.A.A.A. create and place approximately 80% of all national advertisements, as well as significant portions of regional and local advertising. A.A.A.A. is dedicated to the preservation of a robust free market in commercial ideas.

The American Advertising Federation (AAF) is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters with more than 6,000 student members. AAF members use almost all forms of media to advertise products and communicate with consumers throughout the United States.

Introductory Statement and Summary of Argument

In the teeth of a generation of Supreme Court precedent holding that consumers have a First Amendment right to receive uncensored commercial information, petitioner seeks, in this case, to keep consumers in ignorance by censoring the label on a lawful product. If, argues petitioner, consumers are provided with accurate information about product attributes deemed "socially undesirable" by the state, they may base their purchasing decisions on them. If, on the other hand, the state prevents the dissemination of such "dangerous information by deleting it from a product's label, consumers will be spared the temptation to behave in ways the state brands as "socially undesirable". In other words, petitioner offers Americans better living through censorship.

In this case, the so-called dangerous information is the amount of alcohol in a bottle of beer. But petitioner's theory of paternalistic censorship cannot be limited to beer. Fears that some consumers are overly concerned with driving too fast would equally justify a ban on accurate information about a car's horsepower, or a gasoline's octane. Fears that some investors are too concerned with a quick profit would justify a ban on accurate data about short term economic performance. Indeed, under the government's theory, consumers can even be denied accurate information about lower prices in order to "protect" them against "socially undesirable" purchases.

The invitation to use state-mandated ignorance as a paternalistic behavior modification device breaks down on multiple levels. First, and most importantly, *amici* believe that consumers have an absolute First Amendment right to receive uncensored, accurate information about lawful products they are about to buy. In a free society, individuals have a right to uncensored, accurate information needed to make lawful choices—economic, social and political. If the majority believes that a given choice is "socially undesirable", government may argue against it; government may even ban the choice entirely. Government may not, however, purport to leave a choice free, but sabotage its exercise by censoring truthful information needed to make it. Since the First Amendment forbids the state from using government-mandated ignorance as a regulatory policy, the assertion by petitioner that American consumers cannot be trusted with the truth about a lawful product they are about to buy does not even qualify as a legitimate government interest within the meaning of *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Second, if government is ever empowered to deny consumers access to truthful commercial speech about a lawful product, it must, at a minimum, demonstrate an extremely strong government interest in censorship to overcome a consumer's obvious interest in knowing the truth about a product she is about to buy. Under *Central Hudson*, the government must demonstrate three things: (1) that the speech in question poses a risk of serious harm; (2) that the harm will be materially and directly alleviated by censorship; and (3) that the regulation does not censor more speech than necessary. In this case, petitioner cannot satisfy any of the *Central Hudson* prerequisites. Petitioner's claim that the speech ban is needed to forestall socially undesirable "strength wars" among brewers seeking to market beer on the basis of alcohol content is not supported by the historical evidence, by evidence of contemporary practice, or by the experience of the wine and distilled spirits industries, both of which disclose alcohol content on labels without the adverse consequences predicted by petitioner[1]. In fact, accurate information about alcohol content is more likely to lead many contemporary consumers to seek beer with a lower alcohol content.

Moreover, even if one erroneously assumes that a real threat of strength wars exists, the government's prophylactic approach results in far more censorship than necessary.

Finally, the assertion by the United States of nationwide regulatory authority over malt beverage labels is based on an untenable reading of Sections 205 (e) and (f) the Federal Alcohol Administration Act. The 1935 Act sought, *inter alia*, to regulate unfair trade practices in the alcohol beverage industry. Section 205(e)(2) governs labeling. Section 205(f)(2) governs advertising. But the applicability of both sections to malt beverages is conditioned by a proviso in section 205(f) stating that the provisions of (e) and (f) apply only in those states that have enacted "similar" rules governing intra-state transactions. At most, therefore, the federal regulations at issue in this case apply in 20 states and the District of Columbia. Petitioner's persistent attempt to impose 205(e) in the 30 states where it does not apply belies the government's effort to disguise its use of the statute as an exercise in cooperative federalism.

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[1] Under the Federal Alcohol Administration Act, distilled spirits must disclose alcohol content on the label. Wines with less than 14% alcohol content may disclose alcohol content on the label. Wines with more than 14% alcohol content must disclose alcohol content on the label. 27 U.S.C. 205(e)(2) (hereafter cited as 205(e)(2)).

I.

THE UNITED STATES IS PROCEEDING UNDER AN INDEFENSIBLE READING OF ITS LEGISLATIVE AUTHORITY. AS CONSTRUED BY PETITIONER, SEC. 205(e) IMPROPERLY IMPOSES FEDERAL REGULATION ON AT LEAST 30 STATES.

Petitioner inaccurately characterizes its reading of Sec. 205(e)(2)[2] as an exercise in cooperative federalism designed to reflect and reinforce the regulatory judgments of all 50 states and the District of Columbia. As such, petitioner claims that Sec. 205(e) is entitled to deferential treatment as an effort to implement the states' rights philosophy of the 21st Amendment. *Brief for Petitioner*, at 41-45. As construed by the United States, however, Sec. 205(e) does not defer to state regulatory judgments. Rather, as construed by petitioner, Sec. 205(e) improperly imposes federal regulation on 30 states in flat contravention of the policies underlying the 21st Amendment.

Petitioner has repeatedly argued that the federal prohibition imposed by 205(e)(2) is in force in all 50 states and the District of Columbia. *Brief for Petitioner*, at n.4 and pp. 9-11. In 20 states and the District of Columbia, the United States notes that the applicability of 205(e)(2) is triggered by state laws imposing parallel regulations on intra-state beer transactions.[3] In 20 states, the government argues that a state's failure to have enacted any regulations governing intra-state beer transactions constitutes acquiescence in the federal ban through silence.[4] In 10 states, the government apparently argues that

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2 The operative language of section 205(e)(2) forbids labels on malt beverages containing:

> ". . . statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages . . . unless required by state law."

3 The jurisdictions are listed in the *Brief for Petitioner* at n. 7.

4 The jurisdictions are listed in the *Brief for Petitioner*, at n.9.

the federal ban applies interstitially, supplementing state laws requiring disclosure of alcohol content above or below a fixed amount.[5]

But petitioner's long-standing assertion of nationwide regulatory authority under 205(e) cannot be defended. In fact, the labeling restrictions imposed by petitioner under 205(e)(2) should be inapplicable in the 20 states that have remained silent on the issue of disclosure of alcohol content; should be inapplicable in the 10 states that have enacted legislation mandating disclosure above or below given amounts of alcohol; and may well be inapplicable in at least some of the remaining 20 states.

Petitioner's so-called exercise in cooperative federalism ignores the proviso added to 205(f) by the Conference Committee in 1935, which states:

> "In the case of [interstate] malt beverages, the provisions of this subsection [governing advertising] and subsection (e) of this section [governing labeling] shall apply . . . only to the extent that the law of [a] State imposes similar requirements with respect to the labeling or advertising, as the case may be, of [intra-state] malt beverages . . . ." (material in brackets added).

Petitioner recognizes that the 205(f) proviso precludes the application of the advertising regulations imposed by section 205(f)(2) in those states that have not enacted the required parallel state legislation. *Brief of Petitioner*, at n.4. Petitioner denies, however, that the proviso imposes an identical geographical limitation on federal power to regulate labels. *Brief of Petitioner*, at n.4. Petitioner apparently believes that the language in section 205(e)(2) banning disclosure of alcohol content "unless required by state law" avoids the 205(f) proviso by making a state's silence the equivalent of positive state adoption of the federal legislation.

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5 The jurisdictions are listed in the *Brief for Petitioner*, at n. 10.

Petitioner's assertion of nationwide power under 205(e) is, however, untenable. In 1935, all agreed that Congress lacked power under the Commerce Clause to regulate wholly intra-state malt beverage transactions.[6] Since 80% of the malt beverage industry operated in a purely intra-state manner in 1935, the Senate version of the Federal Alcohol Administration Act completely omitted the industry from coverage. See S. Rep. No. 1215; 74th Cong., 1st Sess. (1935). See also Cong. Rec., vol 79, No. 168, pp. 13395-13419. The House version, on the other hand, purported to place the 20% of the industry engaged in interstate transactions under federal regulation, despite arguments by the Senate that interstate brewers would be at an unfair disadvantage when competing against unregulated intra-state brewers. See H.R. Rep. No. 1542, 74th Cong., 1st Sess. (1935); See also Cong. Rec., vol. 79, No. 151, pp 12259-12272.

The 205(f) proviso was inserted by the Conference Committee as a compromise between the House and Senate versions. It was designed to eliminate the possibility of unfair competition between inter-state and intra-state brewers by limiting the geographical reach of federal regulation of inter-state brewers to those states where "similar" regulations governing intra-state brewers were in effect. See Conference Report and Statement of Managers to the House, House Report No. 1898 (Cong. Rec., vol 79, No. 176, pp. 14672-14676; 14806-14810; *id* at pp. 14948-14953 (Senate agreement). See also Cong Rec., vol. 79 pp. 14475 (Aug. 24, 1935) (Senate) and Cong Rec., vol. 79 p. 14565-68 (Aug. 24, 1935) (House).[7] Thus, pursuant to the compromise, if a state remains silent with respect to intra-state brewers, or if it enacts intra-state regulations that differ from the federal norms governing

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[6] See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[7] The genesis of the proviso may be found in the hearings before the Senate Committee on Finance, 74th Cong., 1st Sess, July 26, 27, and 29th, 1935, at pp 97; 113; 122; and 138.

interstate brewers, the federal legislation simply does not apply in that state.

Petitioner concedes that 30 states have either remained silent or have enacted some form of label regulation that differs significantly from the federal norm. Thus, at most, his statutory power under section 205(e)(2) applies in 20 states and the District of Columbia. Moreover, when one examines the laws of those jurisdictions, potential issues of parallelism exist in some of them, making it difficult to predict with precision where section 205(e) applies.[8]

At least three consequences flow from petitioner's long-standing but erroneous effort to enforce Sec. 205(e) on a nationwide basis. First, it makes a mockery of petitioner's claim of cooperative federalism. Genuine federalism is hardly advanced by the sustained imposition of unauthorized federal regulation on more than 30 states.

Second, recognition that petitioner's long-time reading of the geographical scope of 205(e) is untenable may cause the Executive branch to reconsider its tenuous commitment to a dubious regulatory scheme that actually applies in no more than 20 states.[9]

Finally, while *amici* believe that a case or controversy continues to exist empowering the Court to reach the significant First Amendment issues raised by petitioner's adoption of state-imposed ignorance as a regulatory policy, the Court may wish to re-assess the appropriateness of deciding an important

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[8] The United States identifies only 10 states that have explicitly adopted the federal standards. *Brief of Petitioner*, at 10-11 & n.8. The laws of the remaining 10 states and the District of Columbia remain to be parsed to determine whether the state regulation is sufficiently "similar" to trigger the federal law.

[9] The commitment of the Executive branch to the speech ban imposed by 205(e) has not been unwavering. In fact, the United States initially agreed that 205(e) violates the First Amendment. Confronted with the fact that the ban is not nationwide, the United States may well choose to return to its initial position.

constitutional question in the context of a hopelessly flawed statutory position.[10] If, however, the Court elects to reach the First Amendment issue posed by petitioner's ban, neither the state nor the federal bans can survive First Amendment analysis.[11]

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[10] According to petitioner, 10 states have adopted the federal regulations. Thus, 205(e)(2) would appear to apply in at least 10 states, creating an ongoing case or controversy. Even in those 10 states, though, the effect of 205(e)(2) is essentially redundant, since the operative regulation in each is state law not federal law. Petitioner's effort to construct an additional federal prop for its censorship program is, thus, unavailing.

[11] The 21st Amendment adds nothing to petitioner's argument. As applied to the federal ban before the Court, the 21st Amendment provides no support for petitioner's effort to impose federal regulations on 30 states that have opted for different regulatory schemes. See *Capital Cities, Inc. v. Crisp*, 467 U.S. 691 (1984).

Nor can the 21st Amendment be read to grant states or the federal government power to deny consumers truthful information about a product they are about to buy. The Amendment enhances the states' commerce clause powers; it does not diminish substantive constitutional rights. See *Craig v. Boren*, 429 U.S. 190, 206 (1976) (21st Amendment does not erode Equal Protection guarantees); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (21st Amendment does not erode Due Process guarantees); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (21st Amendment does not erode Establishment Clause guarantees). *California v. LaRue*, 409 U.S. 109 (1972) is not to the contrary, since the conduct at issue in *LaRue* (nude dancing in bars) has been held to be subject to state regulation under the First Amendment without regard to the 21st Amendment. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

II.

PETITIONER'S EFFORT TO DENY CONSUMERS ACCURATE INFORMATION ABOUT A PRODUCT THEY ARE ABOUT TO BUY VIOLATES THE FIRST AMENDMENT

A. Consumers Have an Absolute First Amendment Right to Uncensored Information About the Lawful Products They Are About to Buy.

The key to a generation of commercial free speech cases in this Court is respect for a consumer's absolute right to receive uncensored, accurate information about lawful consumer choices. Despite claims that the free flow of commercial information would cause substantial harm, ranging from the undermining of neighborhood pharmacies[12]; to interference with efforts to maintain integrated neighborhoods[13]; to erosion of the moral fiber of the young[14], this Court has repeatedly recognized that a consumer-driven, free market economy cannot function efficiently in the absence of a free flow of uncensored, truthful commercial information. Just as a functioning political democracy requires the free flow of information needed to make informed political choices, a functioning market economy is dependent on informed choice by autonomous consumers for its efficient operation.

Thus, in the 18 years since the Court explicitly recognized in *Virginia Pharmacy* that commercial speech is entitled to First Amendment protection, it has repeatedly upheld the consumer's right to receive accurate, uncensored commercial information relevant to the making of a lawful economic choice. E.g. *Virginia State Board of Pharmacy v. Virginia Cit-*

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[12] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[13] *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977).

[14] *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977).

izens Consumer Council, 425 U.S. 748, 763-65 (1976) (price information concerning prescription drugs); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (information on availability of real estate); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (information about birth control devices); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374, 75 (1977) (information on price and availability of legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980)(information on availability of electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (information on availability of legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983)(commercial information in the mails about birth control); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (information on availability of legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 & n.18 (1990) (same); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face information about accountant's services); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994) (accurate information concerning lawyers' qualifications).

In settings where commercial speech does not assist the consumer in making an informed, autonomous choice, this Court has declined to afford it First Amendment protection. For example, where a commercial speaker solicits a consumer to engage in unlawful commercial activity, the speech is not protected by the First Amendment because the consumer's choice is not a lawful one. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (sex-typed want ads not protected)[15]. Similarly, where commercial speech

[15] Petitioner cites *United States v. Edge Broadcasting Co.*, 510 U.S. ___ (1993) as support for its speech ban. *Edge Broadcasting* is inapplicable for at least two reasons. First, the statute in *Edge Broadcasting* was a genuine attempt to respect conflicting state policies. As *amici* have demonstrated, however, petitioner's reading of 205(e) hardly qualifies as an effort to respect the policies of the 30 states that it overrides. Second, and more importantly, *Edge Broadcasting* is merely a complex application of the *Pittsburgh Press* principle. In *Edge Broadcasting*, the United States keyed the legality of broadcast advertisements for state lotteries to whether the activity was lawful in the state from which the speech was transmitted. *Amici* continue to believe that legality at the point of receipt is the constitutionally preferable standard. In any event, however, *Edge Broadcasting* says nothing about truthful speech concerning universally lawful economic choices.

is false or misleading, the speech may be forbidden because it actually impedes consumers in making the informed and autonomous choice on which a free market economy depends. *Friedman v. Rogers*, 440 U.S. 1 (1979) (ban on misleading trade names). Thus, whether one focuses on the many cases upholding commercial free speech claims, or on the handful of settings in which commercial free speech claims have been rejected, the Court's central concern has been the consumer's right to receive uncensored, accurate information in order to make an informed and autonomous choice.

The Court's pre-occupation with the consumer's right to know reflects a structural difference between commercial and non-commercial speech. In the non-commercial speech context, First Amendment doctrine is a function of two fundamental sets of interests: (1) the speaker's dignitary interest in individual self-expression[16]; and (2) the hearer's instrumental interest in receiving information.[17] When the two values point in the same direction, as in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *New York Times Co. v. United States*, 403 U.S. 713 (1971), non-commercial First Amendment protection is at its apogee.

[16] The leading exponent of free expression as an inherent aspect of individual dignity is Tom Emerson. Emerson, *The System of Free Expression* (1970).

[17] The leading exponent of free speech as an aid to informed decision-making is Alexander Meikeljohn. A. Meikeljohn, *Free Speech and Its Relationship to Self-Government* (1948).

When speaker and hearer interests are in tension, however, the Court has recognized that a political or aesthetic speaker's dignitary interest in self-expression supports a broad toleration principle that protects a speaker, even when the speech is of little or no apparent value to hearers. Thus, when speaker and hearer interests divide, our non-commercial First Amendment tradition has tended to favor the speaker's dignitary interest in individual self-expression, even when the speech is hateful, inaccurate and deeply offensive to hearers; at least in the absence of an extremely powerful hearer interest. Compare, e.g., *Cohen v. California*, 403 U.S. 15 (1971) ("Fuck the Draft" slogan on jacket protected despite offensiveness to onlookers); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag protected); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); and *Collin v. Smith*, 447 F.Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (Nazi demonstration in Jewish suburb of Chicago protected) with *Frisby v. Schultz*, 487 U.S. 474 (1988) (right to be free from "focused picketing" at home); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (right not to be "captive audience"); and *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) (no right to be free from proselytization; right to be free from harassment and intimidation).

Unlike non-commercial speech about religion, politics or art, however, speech that "merely proposes a commercial transaction"[18] has occasionally been treated by the Court as failing to implicate a significant speaker interest in self-expression. *Amici* believe that current doctrine underestimates the quality and intensity of the speaker's interest in commercial speech, especially in settings where a commercial speaker seeks to convey truthful information about a product of which the speaker is intensely proud. Much commercial speech reflects an intense personal pride in the quality and

[18] The phrase is drawn from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

value of the product that more than rivals the dignitary interest of many non-commercial speakers. Indeed, in settings where, as here, a commercial speaker wishes to disseminate truthful information of assistance to hearers in making an economic choice, the mutually-reinforcing interests of both speaker and hearer should combine to provide reiprocal protection for the processes for a free market.[19]

On the other hand, the Court has recognized that the *hearer's* interest in receiving truthful, non-deceptive speech about economic choices is, if anything, more intense than in many non-commercial settings. *Id.* at 763-64. See Neuborne, *The Pomerantz Lecture: First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn L. Rev. 5, 31-32 (1989). Not surprisingly, lacking a uniformly strong recognition of a speaker/dignitary interest, but boasting an extremely powerful hearer interest, the commercial speech jurisprudence of the Court may fairly be characterized as "hearer-centered".[20]

[19] The Court has noted the difficulty of distinguishing between commercial and non-commercial speech precisely because commercial speakers often possess a significant interest in self-expression. Eg. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Id.* at 81 (Stevens, J. concurring); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481-82 (1989).

[20] The difference between a speaker-centered jurisprudence in non-commercial settings and a hearer-centered jurisprudence in commercial speech settings has occasionally been misconstrued as a value judgment about the relative unimportance of commercial speech. But see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___ (1993) (rejecting attempt to censor commercial speech based on its alleged unimportance).

The assertion that commercial speech is less important than non-commercial speech is simply wrong, both at the level of society and the individual. From the standpoint of an individual hearer, it is often demonstrably more important to receive information about a product than to receive non-commercial information. Compare, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748,

Where, as here, a commercial speaker seeks to disseminate accurate information of interest to consumers, *amici* believe that the jurisprudence of this Court should be neither speaker, nor hearer, centered. Rather, it should be "process-centered" in an effort to support the optimum working of a free market dependent upon willing speakers and informed hearers.

In the hearer-centered commercial speech world constructed by this Court, or the process-centered world urged by *amici*, where commercial information is truthful and of obvious assistance to a competent consumer in making an informed choice, *amici* believe that American consumers have an *absolute* right to receive uncensored information about the contents and the attributes of a lawful product they are about to buy. While absolutes are rare in the law, *amici* cannot imagine a government interest sufficiently weighty to counterbalance a consumer's right to be free from government-imposed ignorance about the attributes of a product she is about to buy. Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

B. The Government's Assertion of an Interest in Maintaining Consumer Ignorance Fails to Qualify as a Legitimate State Interest Within the Meaning of *Central Hudson*.

Amici believe that no government interest, however compelling, can override a consumer's right to be free from government censorship of the truth. If, however, the state chooses to attempt to deny consumers accurate information about a product they are about to buy, it must, at a minimum, assert a governmental interest of the highest order. In *Central Hudson*,

763-64 (1976)(price advertising of prescription drugs) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 86 (1977) (real estate information) with *Cohen v. California*, 403 U.S. 15 (1971) (scatological phrase on speaker's jacket); and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag). Similarly, in the context of many commercial messages, the speaker's pride in his product may generate a more intense dignitary need to speak than in many non-commercial settings.

this Court required the government interest in regulating commercial speech to be at least "substantial". In this case, however, the interest in censorship asserted by petitioner is not even legitimate.

Although couched in terms of strength wars and federalism, the real interest asserted by the United States is a lack of faith in the capacity of American consumers to cope with the truth.[21] Such an interest in state-mandated ignorance does not even qualify as "legitimate", much less as "substantial".

In the mundane circumstances of the label on a bottle of beer, two contrasting visions of the individual collide in this case. On the one hand, respondent and *amici* view the average American consumer as competent to receive, assess and evaluate a wide variety of commercial information as the first step in making rational, autonomous decisions about consumer preferences. *Amici* believe that American consumers, immersed in a sea of information and persuasion, are fully capable of reasoned, autonomous choices about whether and what to purchase.

The 1935 ban on truthful information, on the other hand, treats American consumers as untrustworthy and vulnerable pawns, subject to manipulation by producers and prey to "socially undesirable" judgments about their best interests. The 1935 Act treats consumers as if they were drowning in an information sea, in need of government-mandated ignorance as a life preserver.

Amici believe that the First Amendment flatly rejects the 1935 Act's jaundiced view of the capacity of American con-

[21] Petitioner asserts two government interests in support of his censorship program: respect for state policy judgments and fear of strength wars. *Amici* have demonstrated that petitioner's untenable reading of 205(e) does not respect the policy judgments of at least 30 states. More importantly, both interests are merely euphemisms for a mistrust of the consumer's ability to handle the truth about "socially undesirable" product attributes.

sumers to act rationally on the basis of truthful information. The very existence of freedom of speech is premised on an assumption that individuals are capable of dealing with the truth. Indeed, when, as here, government censorship is premised on a vote of no-confidence in the capacity of the average individual to deal wisely with truthful information, it erodes a necessary attribute of freedom.

Free political and economic systems cannot endure unless they are firmly grounded in respect for the capacity of the individual to evaluate information and to make reasoned, autonomous choices. If American consumers cannot be trusted to know how much alcohol is in the bottle of beer they are about to buy, how can the same individuals be trusted to make the political judgments necessary to govern a free nation? If we accept paternalistic arguments in favor of censoring truthful commercial information, we take an inevitable step towards a similar acceptance of paternalistic censorship in the political arena.

No case has ever upheld a flat ban on the dissemination of truthful information about a lawful product. The government's effort to cite *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) in support of its position is unavailing.

In *Posadas*, this Court narrowly upheld a regulation banning certain advertising of casino gambling. The original version of the regulation in *Posadas* had flatly banned all communication in the Spanish language capable of reaching the attention of residents of Puerto Rico. *Id* at 332-33. As such, it was analogous to the information ban at issue in this case. The Superior Court of Puerto Rico struck down the original information ban as violative of the First Amendment. *Id* at 335-36. The regulation actually before this Court in *Posadas* (after modification by the Superior Court of Puerto Rico) permitted widespread dissemination of truthful information about casino gambling in the Spanish language press and the distribution of promotional material in Spanish.

Instead of the actual holding in *Posadas*, petitioner seeks to rely on *dicta* by then-Justice Rehnquist arguing that, in the context of commercial activities that may be banned under the police power, government may elect a "lesser" form of regulation consisting of censorship of truthful information about the activity.[22] The *Posadas dicta* should be rejected as wrong on at least two counts. First, the notion that the "greater" power to ban an activity carries with it a "lesser" power to condition its exercise on a waiver of free speech rights has repeatedly been rejected by this Court; and, second, using information control as a covert form of behavior modification is not a "lesser" interference with constitutional values than the enactment of an overt ban on an activity.[23]

The Chief Justice's argument in *Posadas* that the "greater" governmental power to prevent an activity "necessarily" authorizes the government to place whatever "lesser" conditions it wishes on its exercise, including the waiver of constitutional rights, has been rejected in every context in which it has been asserted. See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev.1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988). Indeed, this Court has repeatedly recognized that one of the most important functions of a constitution is to constrain the government in the

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[22] The precise language used by then-Justice Rehnquist was:

> ". . . the greater power to ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . ." 478 U.S. at 345-46.

[23] Academic commentary has been extremely critical of Justice Rehnquist's *dicta* in *Posadas*. E.g. Kurland, *Posadas de Puerto Rico v. Tourism Company: 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 Sup. Ct. Rev. 1 (1986); McGowan, *A Critical Analysis of Commercial Speech*, 78 Calif. L. Rev. 359 (1990); Lively, *The Supreme Court and Commercial Speech: New Words With an Old Message*, 72 Minn. L. Rev. 289 (1987); Rotunda, *Symposium: "To Endure for Ages to Come": A Bicentennial View of the Constitution*, 65 N.Car. L. Rev. 917 (1987).

exercise of its discretionary power. Thus, when Justice Rehnquist argued that merely because the government could decide whether or not to create certain categories of employment, an employee must "take the bitter with the sweet" and accept a job conditioned on a waiver of procedural due process rights, this Court firmly rejected his position. Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). Indeed, the Chief Justice's "bitter with the sweet" approach was explicitly rejected by eight members of the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Similarly, when the Chief Justice argued that since the government was under no duty to fund non-commercial television, it could condition funding on a waiver of the ability to broadcast privately funded editorials, the Court explicitly rejected his position, holding that the "greater" power did not include the "lesser" power to censor. *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984).[24]

The current Court should similarly reject the dictum in *Posadas*.

In defense of his dictum, the Chief Justice argued in *Posadas* that censoring commercial speech about an activity is a less drastic government response than an outright ban. But such an argument misconstrues a fundamental postulate of a free society—the integrity of autonomous, individual choice. A free society can tolerate regulation of behavior; a truly free society cannot tolerate regulation of truthful speech as a covert means of behavior modification.

[24] *Rust v. Sullivan*, 112 S.Ct. 1759 (1989), even if correctly decided, is not to the contrary, since it dealt with the government's right to decide how its own resources were to be expended. This case attempts to dictate the speech of private actors using their own resources.

While regulation of behavior interferes with autonomous choice, the interference occurs openly, and only after a full political debate. Regulation of speech about a lawful choice is, however, a far more "drastic" event, since it attacks autonomous choice in a covert manner. It leaves citizens with the illusion of freedom, but the reality of government manipulation.

Our system will doubtless survive the foolish censorship of beer labels. But the constitutional precedent established by such paternalistic censorship cannot be confined to a bottle of beer. Freedom of speech is fragile. It is only as strong as its weakest principled link. If this case validates a principle that recognizes paternalism as an excuse for state-mandated ignorance, we will soon be censoring more than beer labels.

C. The Government Has Not Demonstrated a Sufficient Risk of Harm Caused by the Truthful Speech At Issue.

The only "harm" that the government claims may be caused by truthful speech in this case is the specter of brewers seeking to attract customers on the basis of higher alcohol content. The government's "strength war" bogeyman is really an assertion that consumers cannot be trusted with the truth. As such, it is not a legitimate government interest.

Even if, however, one assumes that preventing so-called strength wars qualifies as a substantial government interest, the United States has failed to demonstrate the requisite causal nexus between the truthful speech in question and the feared harm. At most, the government asserts that truthful speech on labels about alcohol content may have a "bad tendency" to lead to strength wars.

Prior to the pathbreaking free speech opinions of Justices Holmes and Brandeis[25], the state was free to censor speech

[25] *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes and Brandeis dissenting); *United States ex rel Milwaukee Soc. Democrat Publishing Co., v.*

whenever the majority had a "reasonable belief" that speech had a "bad tendency" to lead to undesirable behavior. E.g. *Abrams v. United States*, 250 U.S. 616 (1919) *Gitlow v. New York*, 268 U.S. 652 (1925). Justices Holmes and Brandeis recognized that the "bad tendency" standard provided no protection to controversial speech. The essence of modern free speech protection is, therefore, a rejection of the bad tendency/reasonable belief test in favor of heightened judicial scrutiny of a censor's claim that speech should be banned because it creates a risk of harm.

In non-commercial speech contexts, the bad tendency/rational basis test has been supplanted by the rigorous "clear and present danger" test, requiring an almost certain causal nexus between speech and the harm it is alleged to cause. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). When, as here, commercial speech is at issue, the heightened causation standard is reflected by the requirement that a would-be censor demonstrate that censorship is necessary to "directly" and "materially" advance the asserted government interest. *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

The government's unsuccessful effort below to demonstrate a powerful causal link between truthful speech about alcohol content and so-called strength wars consisted largely of: (1) claims that strength wars occurred prior to the passage of the 1935 Act; (2) allegations that contemporary brewers are engaging in strength wars; and (3) claims that strength wars occur in unregulated jurisdictions. In fact, however, each aspect of the government's effort to prove that truthful speech will lead to strength wars is badly flawed.

Burleson, 255 U.S. 407, 436-38 (1920) (Holmes, J. dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J. dissenting); *Pierce v. United States*, 252 U.S. 239, 272-73 (1920) (Holmes and Brandeis, dissenting); *Schuyler v. United States*, 251 U.S. 466, 482 (1920) (Holmes and Brandeis, JJ. dissenting); *Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis and Holmes, concurring).

The government's claim that brewers engaged in strength wars during the relatively short period between the repeal of Prohibition and the enactment of 205(e) in 1935 is flawed on two levels. First, what happened sixty years ago during the chaotic period following the repeal of Prohibition and the invalidation of the National Recovery Act is hardly predictive of contemporary behavior. More importantly, the government's claim that the 1935 Act was triggered in part by concerns that brewers were actually increasing the quantity of alcohol in their product is not borne out by the legislative record. Rather, when one examines the testimony cited by the government, the concern in 1935 was over false and misleading claims about increased alcohol content; not an actual increase in alcohol content.[26] While *amici* have no quarrel with a ban on false or misleading statements of alcohol content, the government cannot parlay a 1935 concern about accuracy into proof that truth will lead to strength wars in 1994.

Nor is the government's case stronger when one considers the contemporary behavior of the malt beverage industry. The

[26] A reading of the 1935 testimony cited by petitioner makes clear that concern with statements about alcohol content was largely driven by false and misleading assertions; not by actual strength wars. For example, the testimony of George McCabe quoted by petitioner at p. 8 of the *Brief for Petitioner*, states:

> Some brewers went haywire . . . and were trying to sell their beer on an alcohol basis, and they resorted . . . to the use of all sorts of numbers . . . to convey the impression that the beer contained an excessive amount of alcohol, *which it did not contain*. (emphasis added).

Similarly, the House Report cited by petitioner at p. 9 of its brief (H.R. Rep. 1542, pp.12-13) made clear that the statements about alcohol content that troubled the Committee were false and misleading. For example, the Committee Report argued that "irrespective of th[e] falsity" of such statements, they threatened "fair competition". It was the Committee's fear of "unscrupulous advertising" and "deceptive labeling practices" that drove the ban. See also, H.R. Rep. 1542, p. 144.

United States presented virtually no evidence of competition on the basis of alcohol content in those jurisdictions that require or allow truthful reporting of alcohol content of malt beverages.

Finally, the government's claim that truth will inevitably lead to strength wars completely ignores the experience of the distilled spirits industry, which has not experienced strength wars despite a federal requirement that alcohol content be truthfully disclosed; and the wine industry, which has not experienced strength wars despite a combination of authorization and obligation to disclose alcohol content.[27]

It is possible that the government's case is so weak that it would even fail the bad tendency/rational basis test. In any event, it cannot satisfy any variant of heightened causation associated with any level of First Amendment review. In apparent recognition of that fact, the government seeks to demote the truthful speech in question to a level of rational basis/ bad tendency scrutiny, by arguing that certain "socially undesirable" commercial speech is entitled to diminished protection and by arguing that the 21st Amendment erodes traditional First Amendment protections.

Such a ploy is merely an indirect way of arguing that the disfavored speech is entitled to no First Amendment protection at all. As Justices Holmes and Brandeis understood, demoting the protection afforded speech to the level of rational basis/bad tendency virtually eliminates any practical distinction between regulating speech and regulating behavior. Rational basis is simply not the test in a modern First Amendment case. *Discovery Network*, 113 S.Ct. 1510, n.13.

Adoption of a rational basis/bad tendency standard in commercial free speech cases to review the assertion of a causal nexus between speech and harm would drain the term

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27 Federal law permits accurate disclosure of the alcohol content of wines up to 14%, and compels disclosure above that point. See Sec. 205 (e).

"directly advance" of any meaning. Not surprisingly, this Court has repeatedly rejected similar efforts to censor on the basis of a "rational" fear that truthful commercial speech might cause substantial harm. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), for example, the Court acknowledged that it was rational to fear that price advertising for prescription drugs might erode the economic stability and professional standards of local pharmacists. Nevertheless, the Court ruled that proof of a more persuasive causal link between speech and improper behavior was required before truthful commercial speech could be censored. In *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977), Justice Marshall acknowledged that it was rational to fear that the uncontrolled display of "for sale" signs in racially troubled neighborhoods might exacerbate white flight and blockbusting. Nevertheless, the Court demanded a more persuasive demonstration of the causal link between outdoor signs and improper behavior before condoning censorship of outdoor signs. In *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977), the Court acknowledged that it was rational to fear that the uncontrolled advertisement and sale of contraceptives might induce some hearers (especially adolescents) to engage in socially undesirable sexual behavior. Nevertheless, the Court demanded a more exacting causal link between commercial speech and improper behavior before tolerating censorship of contraceptive advertising aimed at adults. In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the Court acknowledged that it was rational to fear that promotion of electric heat might lead to an unfair utility price structure because increased demand for electricity was not priced at marginal cost. Nevertheless, Justice Powell, writing for the Court in *Central Hudson*, coined the phrase "directly advances" to explain why New York's speculative link between commercial speech and harm was insufficient to justify censorship. Most recently, in *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the Court acknowledged that it was rational for Florida to fear

that face-to-face solicitation of new business by accountants might lead to deceptive advertising and invasions of privacy and might undermine the independence of CPA's. Nevertheless, Justice Kennedy, writing for eight members of the Court in *Edenfield*, ruled that Florida had failed to demonstrate the requisite causal link between the targeted speech and the feared evil. In words particularly applicable to this case, Justice Kennedy noted:

> This burden [proving that censorship will "directly advance" a governmental interest] is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. [citations omitted]. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. 113 S.Ct. at 1800.

D. The Scope of the Censorship Program Is Far Broader Than Necessary.

Justice Holmes' second great contribution to free speech theory was his recognition that censorship may not be permitted to sweep more broadly than reasonably necessary to advance the precise government interest at stake. In the commercial speech context, Justice Holmes' concern over unnecessarily broad censorship is captured by the requirement that censorship be "narrowly tailored" to advance the government's asserted interest. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). While the requirement of "narrow tailoring" in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a careful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990). Such a careful effort is conspicuously missing from the government's scheme.

CONCLUSION

For the above stated reasons, the decision of the United States Court of Appeals for the 10th Circuit should be affirmed.

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Respectfully submitted,

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for Amici Curiae
(Counsel of Record)

John F. Kamp
American Association of
Advertising Agencies
1899 L. Street, N.W.
Washington, D.C. 20036

Attorney for A.A.A.A.

Jeffrey Perlman
1101 Vermont Ave., N.W.
Suite 500
Washington, D.C. 20005

Attorney for AAF

Gilbert H. Weil
60 East 42nd Street
New York, New York 10165

Attorney for A.N.A.

Henry L. Bauman
Valerie Schulte
National Association of
Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036

Attorneys for N.A.B.